No. 68

Brief for Appellee

Filed October 31, 1908

In the Supreme Court of the United States

OCTOBER TERM, 1908

ARKANSAS BUILDING AND LOAN ASSOCIATION PERPETUAL, APPELLANT,

vs.

J. W. MADDIN, SECRETARY OF STATE OF THE STATE OF TEXAS, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF OF APPELLEE.

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STATEMENT OF THE CASE.

The statement of the case made by appellant is substantially correct except in so far as it may appear therefrom on pages 6 and 7 of the brief that certain facts were shown and certain admissions made. The cause was decided upon demurrers and no proof introduced. No admissions were made except by force of the demurrers. (Record, p. 14.)

The case involves two questions which broadly stated are:

FIRST.—*Does the bill show irreparable injury and the absence of adequate remedy at law sufficient to entitle appellant to a writ of injunction?*

SECOND.—*Is the Act of the Texas Legislature mentioned in the bill of complaint invalid for any of the reasons urged against it by appellant?*

If the first proposition, that injunction will not lie, should be resolved in favor of appellee then the judgment of the court is

a correct result, and the judgment of the Circuit Court should be affirmed. Therefore we make the proposition—

FIRST PROPOSITION.

If the appellee is engaged in interstate commerce, as is alleged in the bill of complaint, no permit to do business in Texas is required by the act complained of and there can be no injury in forfeiting a valueless permit giving no rights and not required by law to entitle appellant to do business in Texas, as it is left in no worse position without the permit.

SECOND PROPOSITION.

The petition alleged a tender of the correct amount. If this be true no effective forfeiture of the permit of appellant could be made by appellee and adequate defense at law exists against any attempted forfeiture under such circumstances.

STATEMENT.

The statutes of the State of Texas requiring foreign corporations to obtain a permit to do business in this State, which became the law in 1889, is as follows, from the Revised Statutes of the State of Texas, of 1895:

"Article 745. Hereafter any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other State, or of any Territory of the United States, or any municipality of such State or Territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State, shall be and the same are hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this State. If such corporation is created for more than one purpose the permit may be limited to one or more purposes.

"Art. 746. No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had filed its

articles of incorporation under the provisions of this chapter in the office of the Secretary of State for the purpose of procuring its permit.

"Art. 747. The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating, or maintaining any railway, or to such corporations as are required by law to procure permits to do business from the Commissioner of Agriculture, Insurance, Statistics and History.

"Art. 748. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.

"Art. 749. Either the original permit or certified copies thereof by the Secretary of State shall be evidence of the compliance on the part of any corporation with the terms of this chapter. A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this chapter."

Construing these provisions the courts of Texas have held that the same are not applicable to corporations engaged in interstate commerce, and that no permit is required of them.

Authorities:

Allen vs. Tyson-Jones Buggy Co., 91 Texas, 22.
Miller vs. Goodman, 40 S. W. Rep., 393.

The issues involved in the cause at bar were at one time presented to the Supreme Court of the State of Texas by appellant. The manner in which the case arose and disposition made is fully presented in the following opinion by our Supreme Court, which we cite as authority upon the proposition that no injury appears and adequate remedy at law exists:

"This is a petition, filed by the relator, a building and loan association incorporated under the laws of Arkansas and doing business in that State, to compel the Secretary of State to receive the sum of $10 in payment of its franchise tax for the year 1897, and to give his receipt therefor. The Act of April 3, 1889, required every foreign corporation desiring to do business in this State to file its charter in the office of the Secretary of State and to pay a fee therefor. Laws 1889, p. 87. By a statute passed in 1893 it was also provided that 'each and

every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this State, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this State, in this State, shall pay to the Secretary of State, annually, on or before the first day of May, a franchise tax of $10. Any such corporation which shall fail to pay the tax provided for in this section shall, because of such failure, forfeit their charter.' Laws 1893, p. 158. In July, 1896, the relator filed its charter with the Secretary of State, paid the tax required by the Act of 1889, as well as the annual tax of $10 prescribed in the Act of 1893. In 1897 the latter act was materially amended by the legislature so as to increase the annual tax thereby required, to graduate it according to the capital stock of the corporation, to provide that the failure to pay the tax should work ipso facto a forfeiture of the right to do business in the State, and to provide that the Secretary of State should declare such forfeiture. The tax imposed by this act was less upon domestic than upon foreign corporations. Laws 1897, p. 141. After this statute went into effect, the relator offered to pay the Secretary of State the $10 as required by the previous law, and demanded a receipt for such payment. The respondent declined to accept the money, holding that a much larger sum was required of the corporation under the Act of 1897. The relator, in its petition, alleges these facts, and claims that the Act of 1897, in so far as it increases the annual tax and discriminates between domestic corporations and foreign corporations, is contrary to the constitution of this State and that of the United States and is therefore void. The prayer is for a writ of mandamus to compel the respondent to accept the $10, and to issue his official receipt therefor. The case has been submitted to us upon a demurrer to the petition.

"If we had the power in this proceeding to determine a question merely because the relator may have an interest in its decision, it might be our duty to decide the questions which were discussed upon the argument. But the writ of mandamus should not issue where the relator has another adequate legal remedy for the enforcement of his right. The writ must be the last resort. It should be necessary in order to secure in full the right which is sought to be protected or enforced. If the relator, in legal contemplation, is left in no worse position without the writ than he would be should a mandamus issue, the writ should be denied. Conceding, then, for the purposes of this case, that, as the relator contends, it is only liable to pay the annual tax of $10, as required by the Act of 1893: the question arises, is there any necessity for issuing the writ? The danger which confronts a corporation from a failure to pay its lawful taxes is a forfeiture of its right to do business in the State. That, upon the respondent's refusal

to accept the draft for the tax, a tender of the money legally due would have prevented a forfeiture, there can be no doubt. Loomis vs. Pingree, 43 Me., 299; Tacey vs. Irwin, 18 Wall., 549; Kinsworthy vs. Austin, 23 Ark., 375; Doe vs. Burford, 26 Miss., 194. It would seem, from the authorities cited, that since the officer put his refusal upon the ground of the insufficiency of the amount, no formal tender was necessary. It follows that the actual receipt of the money by the respondent is not necessary for the protection of the alleged right of the relator to continue to do business upon payment of an annual tax of $10, and the writ is therefore refused." (Arkansas Building & Loan Association vs. Madden, Secretary of State, 44 S. W. Rep., 823.)

Passing to a discussion of the act of the Legislature attacked by the bill of complaint, we make two propositions which cover the various phases of the question presented by appellant in its brief.

THIRD PROPOSITION.

The State of Texas, in levying a franchise tax upon corporations, may lawfully classify foreign corporations and domestic corporations into different classes for the reason that their taxing conditions are different, and the allegations of the bill of complaint justify such classification as to appellant.

Authorities:

Home Ins. Co. vs. New York, 134 U. S., 594.
Bell's Gap Railroad vs. Pennsylvania, 134 U. S., 232.
Pacific Express Company vs. Seibert, 142 U. S., 350.
Germania Ins. Co. vs. Commonwealth, 85 Penn., 513.
W. U. Tel. Co. vs. Mayer, 28 Ohio, 521.

FOURTH PROPOSITION.

The State of Texas, as one of the conditions upon which appellant was permitted to enter the State to do business and continue such business, having required at the time of such entry the payment of a franchise tax annually, this requirement became as much a part of the permit as the license itself, and the increase of said tax does not impair any vested right of ap-

pellant or deprive it of the equal protection of the law or destroy uniformity of taxation, although greater than the tax levied upon domestic corporations.

Authorities:

Doyle vs. Continental Ins. Co., 94 U. S., 56.
Paul vs. Virginia, 8 Wall., 168.
Ducat vs. Chicago, 10 Wall., 410.
Pembina Mfg. Co. vs. Penn., 125 U. S., 183.
Phila. Fire Association vs. New York, 119 U. S., 110.
Ducat vs. Chicago, 48 Ill. (95 Am. Dec.).
People vs. Home Ins. Co., 92 N. Y., 320.
State vs. Fosdick, 21 La. Annl., 434.
Attorney-General vs. Mining Co., 99 Mass., 148.
Home Ins. Co. vs. Davis, 29 Mich., 238.
State vs. Lathrop, 10 La., 396.
Ins. Co. vs. Commonwealth, 85 Penn., 513.
Walker vs. Springfield, 94 Ill., 354.
Thompson on Corporations, Vol. 6, Secs., 7877, 7928, 8120.

STATEMENT.

The Constitution of the State of Texas adopted in 1876, provides:

"No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall first be made, or secured by a deposit of money; *and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.* (Constitution of Texas, 1876, Article I, Section 17.)

The Act of 1893, relating to the payment of a franchise tax, reads as follows:

"Art. 5243i. Each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this State, and each and every foreign corporation that has received

or may hereafter receive a permit to do business under the laws of this State, in this State, shall pay to the Secretary of State, annually, on or before the first day of May, a franchise tax of ten dollars. Any such corporation which shall fail to pay the tax provided for in this article shall, because of such failure, forfeit their charter.

"Art. 5243j. The Secretary of State shall, on or before the first day of March of each year, notify all corporations subject to the tax provided in the preceding article, and in thirty days after the first day of May of each year shall publish a list of the charters forfeited for noncompliance with this chapter; provided, that any corporation which shall within sixty days after such publication pay the tax and five dollars additional thereto shall be relieved from forfeiture of its charter by reason of such failure; provided further, that this chapter shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State. (Revised Statutes of Texas, 1895, Arts. 5243i and 5243j.)

The Act of 1897, here brought in question, reads as follows:

An Act to amend Articles 5243i, 5243j, and 5243k, of an act entitled, "An Act to amend Articles 5243e, 5243i, 5243j and 5243k, of Chapter 9, Title 104, of the Revised Civil Statutes, relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this act, and to define and prescribe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this act," passed at the present session and approved April 30th, 1897.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That Articles 5243i, 5243j, and 5243k, of an act entitled, "An act to amend Articles 5243e, 5243i, 5243j and 5243k, of Chapter 9, Title 104, of the Revised Civil Statutes, relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this act, and to define and prescribe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this act," passed at the present session and approved April 30th, 1897, be and the same is hereby amended so as hereafter to read as follows:

Article 5243i. Each and every private domestic corporation heretofore chartered under the laws of this State shall pay to the Secretary of

State an annual franchise tax of ten dollars on or before the first day of May of each year; and every such corporation which shall be hereafter chartered under the laws of this State shall also pay to the Secretary of State an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the Secretary of State shall not be required or permitted to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter; provided, that any such corporation having an authorized capital stock of over fifty thousand dollars and less than a hundred thousand dollars, shall pay an annual franchise tax of twenty dollars; and every such corporation having an authorized capital stock of one hundred thousand dollars and less than two hundred thousand dollars, shall pay an annual franchise tax of thirty dollars; and every such corporation having an authorized capital stock of two hundred thousand dollars or more shall pay an annual franchise tax of fifty dollars. Each and every foreign corporation heretofore authorized to do business in this State under the laws of this State shall, on or before the first day of May of each year, and each and every such corporation which shall hereafter be so authorized to do business in this State, shall, at the time so authorized, and on or before the first day of May of each year thereafter, pay to the Secretary of State the following franchise tax: Every such corporation having an authorized capital stock of twenty-five thousand dollars or less, an annual franchise tax of twenty-five dollars; every such corporation having an authorized capital stock of more than twenty-five thousand dollars and not exceeding one hundred thousand dollars, an annual franchise tax of one hundred dollars; every such corporation having an authorized capital stock of over one hundred thousand dollars, an annual franchise tax of one hundred dollars, and in addition thereto an annual franchise tax of one dollar for every ten thousand dollars of authorized capital stock over and above one hundred thousand dollars and not exceeding one million dollars; and if such authorized capital stock exceeds one million dollars, then such corporation shall pay a still further additional tax of one dollar for every one hundred thousand dollars over and above one million dollars. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated, without judicial ascertainment, by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations, the word, "Forfeited," giving the date of such forfeiture, and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before

such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived as provided in Article 5243j of this act. All transportation companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed.

Article 5243j. The Secretary of State shall on or before the 1st day of March of each year, notify all private, domestic and foreign corporations subject to a franchise tax by any law of this State, by mailing to the postoffice named as the principal place of business of such corporation in its articles of incorporation, or to any other place of business of such corporation, addressed in its corporate name, a written or printed notice that such tax will be due at a date named therein, a record of the date of which mailing must be kept by said officer, and which mailing of such notice and the said record thereof shall constitute legal and sufficient notice for all the purposes of this act; and in thirty days after the 1st day of May of each year, said officer shall publish for ten consecutive days in some daily newspaper published in this State, a list of the corporations whose right to do business in this State has been forfeited for non-compliance with this act; provided, that any corporation which shall within six months after such publication pay the tax and ($5) five dollars additional thereto, for each month or fractional part of a month which shall elapse after such forfeiture, shall be relieved from the forfeiture of its right to do business by reason of such failure, and when such tax and the said penalty are fully paid to the Secretary of State, it shall be the duty of said officer to revive and reinstate said right to do business by erasing or cancelling the word "Forfeited" from his ledger, and substituting therefor the word "Revived," giving the date of such revival; provided further, that this chapter shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State.

* * * * * * * * *

(Art. 5243k relates to matters not germain to this discussion.)

"Section 2. The fact that the close of this session is rapidly approaching, and the further fact that the State is greatly in need of revenue, and in order to remove any doubt of the proper construction of the articles hereby amended, creates an emergency, and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect from and after its passage, and it is so enacted.

"Approved May 15, 1897."

ARGUMENT.

It is freely conceded that the State of Texas could not arbi-

trarily adopt a tax classification obnoxious to substantial equality and uniformity. We contend, however, that neither the Fourteenth Amendment to the Constitution of the United States nor the Constitution of the State of Texas requiring taxes to be equal and uniform, prevent the classification of subjects for taxation, and when State legislation applies to taxation of corporations it is not open to legal objection if all corporations are treated alike which are under similar circumstances and conditions. A State has a right to adjust its system of taxation in all proper and reasonable ways. A system that imposes a tax without reference to conditions or classes would destroy uniformity and equality, and would prevent a just distribution of the burden of taxation. The taxing conditions of a foreign corporation, such as appellant shows itself to be, are dissimilar to those of a domestic corporation.

This corporation has its principal office in the State of Arkansas, where all of its tangible property is situated. This is shown by the bill of complaint. Being a citizen of that State, and its property having a situs there, no ad valorem tax is levied or collected by this State upon its property.

Still it is shown by the bill that the appellant has large demands against citizens of this State and liens upon property in this State and other valuable rights, receiving the benefit and protection of our laws. For this protection it pays nothing but the franchise tax levied, according to its own showing.

A domestic corporation has its property within the State. It is subject to ad valorem tax, and in addition to contributing a franchise tax to the burdens of government pays its ad valorem tax upon all property. It receives no more protection from the government than does the foreign corporation, yet it pays much more tax.

Then when we consider the question of taxing the franchise of corporations, it would appear that a foreign corporation is under different taxing conditions than a domestic corporation. Their franchises should be placed in different classes, just as occupations are taxed in different classes. The merchant who sells a large amount annually may be taxed a larger sum as oc-

cupation tax than the small merchant. So the foreign corporation, which pays no ad valorem tax, may be taxed a larger sum for the opportunity of doing business in this State than the domestic corporation, which does pay an ad valorem tax. Thus the burdens of government are equalized.

This court, in the case of Pacific Express Co. vs. Seibert, 142 U. S., 339, expresses the view for which we contend, in the following language:

"On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made as between express companies defined by this act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed. Their different nature, character and means of doing business justify the discrimination in this respect which the Legislature has seen fit to impose. The legislation in question does not discriminate between companies brought within the class defined in the first section; and such companies being so entirely dissimilar, in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like owning a large amount of tangible and other property subject to taxation under other and different laws, and upon other and different principles, we do not see how, under the principles of the many decisions of this court upon the subject, it can be held violative either of the fourteenth amendment of the Constitution of the United States, or of the provision in the Constitution of Missouri, relating to equality and uniformity of taxation." (Pacific Express Co. vs. Seibert, 142 U. S., 354.)

Again: Foreign corporations are composed of persons residing out of the State. Their internal affairs and proceedings are not subject to our jurisdiction or control. They are free from that control and responsibility to which our own corporations are subjected by our laws. Their stockholders and directors

cannot be reached in our courts by our citizens who are aggrieved. These are matters also that may be considered properly by the Legislature in making this classification.

Speaking in a case involving the same question, the Supreme Court of Ohio in the case of Telegraph Co. vs. Mayer, 28 Ohio, 541, uses the following language:

"They are the conditions upon which the corporations named in the act are allowed to do business within the State.

"Whether this tax is warranted by a wise public policy, and whether it is too onerous, are questions for the Legislature and not for the courts

"The burden is the price paid for transacting their business within the State. Having their principal office in another State, where all their property, except the little that may be within the State, is located, and composed of corporators also beyond the State, they would otherwise be exonerated from an equal share of the public burdens." (W. U. Tel. Co. vs. Mayer, 28 Ohio St., 541.)

We find also the Supreme Court of Pennsylvania, upon a similar question (Insurance Co. vs. Penn., 85 Penn., 513), uses the following pointed language:

"We are of opinion that under the ninth article of the new Constitution, the Legislature has power to classify the subjects of taxation, and that foreign insurance companies may be placed in a class by themselves, and distinct from domestic insurance companies, and may be taxed independently and differently." (Germania Life Ins. Co. vs. Commonwealth, 85 Pa. St., 519.)

While appellant alleges as a conclusion that it is engaged in interstate commerce and is not liable to pay any kind of tax or to obtain any kind of permit imposed by the State, yet by a strange inconsistency it alleges that it obtained a permit to do business in this State and has been doing business in accordance therewith until recently disturbed and still insists upon retaining its permit and paying the old franchise tax and desires to enjoin the officers of the State from cancelling its permit, which applies only to those corporations doing business within the State. The fact that appellant's money is accumulated in Arkansas and loaned to the people of Texas does not make its business inter-

state. The petition shows that it is making its loans in this State upon security in this State to people of this State, and avers in positive terms that it is doing business within this State. The details of conducting the same it does not see fit to disclose.

We, therefore, discuss the case upon the theory of the appellant's doing business within this State. If it were otherwise his case and remedy sought must certainly fail and be denied. Believing, however, that the allegations do not make the business interstate commerce; and desiring a decision upon the validity of the act in question we treat the case as not involving that feature.

A State has a right to prescribe the conditions upon which foreign corporations may be permitted to do business within her borders. She may prohibit them altogether from coming into the State. She may discriminate between her own domestic corporations and those of other States desirous of doing business within her jurisdiction. The nature of such discrimination is to be determined by the State Legislature, subject, of course, to the Constitution of the State and of the United States.

We find that upon the 24th day of July, 1896, when the appellant applied for and obtained a permit to do business in this State, that the continued validity of such permit depended upon the annual payment by the appellant of a franchise tax of ten dollars, the failure to pay same ipso facto revoking the permit. The language used by the act is, "Any such corporation which shall fail to pay the tax provided for in this section shall, because of such failure, forfeit their charter."

It is gravely argued by appellant that this is an attempt by the State of Texas to forfeit the charter granted by another State. It cannot fairly and reasonably be so construed. That it applies to such charters or permits as were granted by this State, and includes the permits or licenses of foreign corporations is clear.

Also the State Constitution provided that all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof. These conditions were attached to appellant's permit. The license was good for only the year that the franchise tax was paid, and no longer.

Failing to pay same it was here without license or permit. "The State having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside at the threshold seeking admission with consent not given." (119 U. S., 119.)

This language is made the more applicable to the case before us when it is borne in mind that our organic law provided that all franchises should be subject to control. If this franchise tax could not be increased then the ad valorem tax upon the property of a corporation could never be increased.

This is not a tax upon property. It is a tax upon the privilege or opportunity of doing business in this State.

Authorities:

People vs. Home Ins. Co., 92 N. Y., 328.
Western Union Tel. Co. vs. Mayer, 28 Ohio St., 521.

Much stress is laid upon the use of the language in the act that it is for the purpose of raising revenue and is called a tax. There is no magic in names. If so we might call attention to the fact that it is specially named a franchise tax. But calling it taxation, and the fact that revenue results from the act and was expected to result when it was passed, cannot change its inherent character or render it invalid. Revenue results from the imposition of all license taxes. The act itself shows that the tax is imposed for the grant of authority by this State to the foreign corporation to do business here. This privilege or opportunity, if embraced by the foreign corporation, the State proposes to charge for. This right is withdrawn if the amount prescribed is not annually paid. That for its franchise theState may levy a greater tax upon foreign corporations as a condition of their doing business here than upon domestic corporations, follows from the conceded doctrine that a State may exclude

the foreign corporations altogether. Indeed, the cases decided by this court are numerous, sustaining a greater franchise tax upon foreign corporations than upon domestic corporations, and imposing upon them different terms and conditions. Many of them we have cited. We do not consider it profitable to review them in this brief at length.

The permit granted to appellant is not a contract with the State. It is a mere license, being nothing more than authority granted by the State to do business here which would otherwise be illegal. (Cooley, Taxation, 386.) The entire law of the State upon the subject became a part of the license, and made its terms and conditions. It certainly—if indeed a contract—could be revoked if its terms provided for revocation, which is the case. But being a mere license in fact, it is always revokable by the State.

Authorities:

Doyle vs. Continental Ins. Co., 94 U. S., 540.
Rector vs. Phila., 24 How., 30.
Humphreys vs. Pegues, 16 Wall., 244.

The final contention made by appellant is that the act is invalid because it provides that the Secretary of State, an executive officer, shall declare the forfeiture, and that such action is judicial and can not lawfully be exercised by an executive officer.

Replying to which contention we make the

FIFTH PROPOSITION.

The power to revoke or forfeit being made to depend upon a breach of the conditions upon which the franchise of the corporation was granted, the legislature can lawfully confer upon an executive officer the power to revoke or forfeit the license, although it depends upon matters of fact, and it is not necessary to wait until those facts have been judicially determined.

Authorities:

Erie & N. E. Ry. Co. vs. Casey, 26 Pa., 302.
Miners Bank vs. United States, 1 Greene (Iowa), 553.
Elizabeth Gaslight Co. vs. Green, 46 N. J. Eq., 118.
Brooklyn Steam Transit vs. Brooklyn, 78 N. Y., 524.
Atkinson Street Railway Co. vs. Nave, 38 Kan., 744.

Also the case of Doyle vs. Continental Ins. Co., 94 U. S. supra, pointedly affirms the right of the State officers to revoke a license or franchise granted to a foreign corporation, and holds that the courts of the United States will not restrain by injunction the officers of a State from withdrawing a license granted to a foreign corporation by the State. This holding is approved in the case of Barron vs. Burnside, 121 U. S., 186.

The appellant admits on page 33 of its brief that by virtue of the constitutional provision heretofore quoted and under the police power of the State the right to revoke the license existed in the Legislature to be exercised as was deemed best for the interests of the people, provided the law enacted prescribes such remedy and was exercised by a competent tribunal.

It is difficult to conceive how it can be admitted that appellant could lawfully be entirely banished from the State and allow domestic corporations to remain, and then with enthusiasm contend that it is unlawful to raise the franchise tax against it to a greater sum than domestic corporations are required to pay. The less discrimination seems, in the view of appellant, to be the greater wrong. In fact the one, it is argued, is no legal wrong, while the other is contrary to both the Constitutions of the State and of the United States.

Admitting that this license of appellant's could be lawfully revoked as the wisdom of the Legislature might dictate, what can be the legal objection to prescribing that unless a certain franchise tax is paid by it that such license should be revoked or forfeited? Does not the whole include every part? Forfeiture as a result is not objected to by appellant; it is the cause of that

forfeiture and the manner of declaring it that the Legislature in its wisdom has provided, to which objection is made.

When our Constitution and laws provided that no franchise should be irrevokable and should be under the control of the Legislature, under all the authorities it is held that this power of revocation could be exercised by the Legislature or by its authority without the aid of the courts, notwithstanding it became necessary to determine questions of fact.

For the reasons here submitted and appearing in the record, we ask that the judgment of the Circuit Court be affirmed.

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